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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 1640 120

DONALD L. UNDERWOOD, CORA UNDERWOOD, PAULINE UNDERWOOD, D. W. UNDERWOOD, ED. MICHALOWSKI, *Petitioners*,

v.

HAROLD L. ICKES, Secretary of the Interior, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

RUSSELL HARDY,
1625 K Street, N. W.,
Washington, D. C.,
Attorney for Petitioners.

HARRY S. REDPATH,
Northern Life Tower,
Seattle, Wash.,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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HAROLD L. ICKES, Secretary of the Interior, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Donald L. Underwood, Cora Underwood, Pauline Underwood, D. W. Underwood, and Ed. Michalowski, respectfully pray for a writ of certiorari to the United States Court of

Appeals for the District of Columbia, to review a judgment entered in the above matter on March 20, 1944.

A certified transcript of the record before the United States Court of Appeals for the District of Columbia, and the proceedings in that Court, are presented herewith in accordance with Rule 38 of this Court.

SUMMARY OF THE MATTER INVOLVED.

The judgment of the Court of Appeals of which review is sought, reversed a judgment of the United States District Court for the District of Columbia, in favor of petitioners, enjoining the Secretary of the Interior from preventing the recovery by petitioners of a large deposit of sand and gravel on the public lands near the Grand Coulee Dam in the State of Washington.

November 11, 1933, petitioners made the discovery and location, and promptly and fully complied with all requirements necessary to entitle them to recover and sell the sand and gravel. April 5, 1934, the Government initiated a so-called "contest" or "adverse proceeding" against the petitioners to defeat their claim. The contest was litigated in the Interior Department for six years and three months (April 11, 1934 to July 11, 1940), and finally ended in a decision against petitioners.

July 29, 1940, petitioners filed a complaint in the District Court of the United States for the District of Columbia asking that the Secretary be required to set aside the adverse decision. A motion to dismiss the Complaint was overruled. Respondent then filed an Answer containing allegations in all respects substantially like those stated in the Complaint. The Complaint and Answer contained complete verbatim copies of the ten decisions or opinions made in the case in the Interior Department. The case was decided for petitioners by the District Court on motion for summary judgment, and judgment was entered on July 14, 1942.

The facts are not in dispute. The opinion of the Court of Appeals does not state the facts in the case. The opinion is brief and consists of a general statement of the issues before, and the action, of the Secretary, a statement of the conventional rule with regard to judicial review of administrative agencies, a general statement that petitioners are not entitled to relief and that the action of the Secretary was valid. On its face, the opinion is probably a correct statement of the law. If the opinion had included a fair and correct statement of the factual situation to which the decision was applied, its revolutionary and erroneous character would be apparent.

Under the rule that statements in a court's opinion are to be taken in connection with the facts of the case, petitioners are entitled to have the opinion and decision considered in the light of the facts to which it is applied, even though they are omitted from the opinion.

The facts are stated in the Complaint and Answer and the exhibits attached thereto, and are as follows:

Before the effort to deprive petitioners of the location was begun in the Interior Department, petitioners had engaged engineers and contractors and had spent in excess of $5,000 in preliminary efforts to develop the deposit. (R. 3, 70). The deposit contained 2,620,138.8 cubic yards of sand and gravel, and was worth about $262,013.88 in the bank. (R. 67, 69). Of course, further substantial expenditures would have been necessitated by the work of recovery.

The attack on the claim by the Secretary of the Interior was based on five charges; i. e., (1) that the claim was located for purposes other than mining, (2) that the claim was located for speculative purposes, (3) that the claimants had not performed the amount of work required by law, (4) that mineral had not been found on the land in sufficient quantities to constitute a valid discovery, and (5) that the land was non-mineral in character.

All of these charges were proved to be unfounded and the facts were finally found by the Secretary in favor of petitioners. Upon that finding, all that remained for the Secretary was a ministerial function. Nevertheless, the claim was denied because of a suspicion that petitioners were guilty of fraud, and because of a special and onerous burden of proof with regard to value which the Secretary decided arose and came into play because of the suspicion. The alleged fraud, suspicion and special burden of proof were stated in the final decision against petitioners as follows (R. 116):

> While there is no positive evidence in the record either that the claimants knew or that it was a matter of general knowledge that the land would be appropriated by the Government, nevertheless the case is not free from the suspicion by reason of the selection of the site for location that the possibility of appropriation thereof by the Government might have been contemplated by the parties, and this possibility was a material inducement for the location. In these circumstances it was all the more incumbent on the claimants, in order to secure a reversal of the previous judgments, to establish with reasonable certainty that the sand and gravel on the claim were commercially valuable. It is the opinion of the Department that in the decisions below there was material error in the estimation and appreciation of the evidence; therefore they must be reversed and the decisions holding the claim invalid affirmed.

Petitioners sought a rehearing on the ground that the suspicion and this rule of evidence amounted to prejudicial error. The decision was upheld, however, and the rule even more strongly stated as follows:

> I cannot agree that these remarks as to the burden of proof amount to prejudicial error. It is a settled rule in this Department that where land has a present or potential value for purposes other than mineral, that fact must be taken into consideration in determining the character of the land. Under such circum-

> stances the evidence of mineral value, in order to sustain the validity of the claim, must be *more clear and convincing* than in cases where there is no conflict with other present or potential values. (R. 121.)

It will be noted that two possibilities are stated as the reasons for the suspicion; first, the *possibility* of appropriation of the land by the Government; and, second, that the first possibility *might have been* contemplated.

In the Interior Department, a long established administrative procedure for adjudicating such cases has long obtained. Pursuant to the rules of practice and statutes governing this procedure, actions like the present concerning rights in public lands are originated in the office of the Register. Any objections to such acquisitions are also lodged in the first instance with the Register. From the decision of the Register for or against a claimant, an appeal may be taken to the Commissioner of the General Land Office, and from the Commissioner to the Secretary of the Interior. The Rules of Practice apply at each stage of the proceedings, before the Register, before the Commissioner, and before the Secretary.

This case has twice traversed the procedural route in the Interior Department. Originally it was before the Register; from the Register it went to the Commissioner; and from the Commissioner to an Assistant Secretary; then back to the Register; and again from the Register to the Commissioner; and finally from the Commissioner to an Under Secretary.

The attack on the claim was originated before the Register at Spokane on the five charges above referred to.

1. The charges were answered, hearings were held, and on June 12, 1935, the Register rendered a decision holding that none of the charges had been sustained. (R. 57)

2. July 10, 1935, the Commissioner of the General Land Office reversed the decision of the Register on the ground that the sand and gravel was deficient in quality, that there

were other deposits of better gravel, and that there was no market for its sale. (R. 61)

3. March 23, 1936, the First Assistant Secretary affirmed the Commissioner, and decided against the claim, on the ground (1) that petitioners probably located the claim because of a probability that the land would have a condemnation value; (2) that they had not met a special and unusually onerous burden of proof which applied because of that probability; (3) that the evidence as to quality was conflicting; (4) that the sand and gravel was not marketable because the demand could be supplied from other pits; and (5) that the only value of the sand and gravel was prospective. (R. 74).

4. September 9, 1937, the First Assistant Secretary granted a petition to reopen the case, on the ground that his previous ruling of March 23, 1936, that prospective value was inadmissible, was erroneous. (R. 87)

5. November 29, 1938, the case having gone back to the Register pursuant to the above decision, the Register (this time a person other than the Register who first passed on the case), decided for petitioners on the ground that the sand and gravel had a market value and could be sold at a profit. (R. 101).

6. February 28, 1939, the Commissioner (who had previously reversed the Register, and decided against petitioners) this time affirmed the Register and decided for petitioners, on the ground that the evidence conclusively showed that there was prospective market value for the sand and gravel. (R. 103.) Petitioners rely upon this decision, contending that it was the last valid and controlling decision.

7. August 11, 1939, an Under Secretary of the Interior reversed the Commissioner and decided against petitioners, on the ground that (1) because the demand for sand and gravel could be supplied by other deposits, the claim

had no value and (2) because there was a "suspicion" that petitioners "might have" selected the site on the "possibility" that it would be appropriated by the Government. (R. 107.) This and the decision which follows were the final decisions against petitioners. Respondent relied on these decisions.

8. June 14, 1940, an Assistant Secretary of the Interior, on a motion for rehearing, decided against petitioners, on the ground (1) that in his decision against the petitioners of August 11, 1939, the Under Secretary had a right to disregard his own Rules of Practice; (2) that, in reversing the Register and the Commissioner, the Under Secretary had a right to disregard their findings of fact and to adjudge the case and make opposite findings de novo; (3) that the Under Secretary had a right to base his decision on the suspicion that petitioners had located the claim on the possibility that it might be appropriated by the Government; and (4) that because of such suspicion, value must be shown by more clear and convincing evidence than if such suspicion had not existed. (R. 117.)

The fraud of which petitioners were suspected was that they had made the location, not for the purpose of recovering the sand and gravel, but to profit by condemnation of the land for the use of the dam. The Department had actually thoroughly investigated the subject, and had found nothing to justify the suspicion. (R. 42.) As to the information produced by the investigation, the Commissioner of the General Land Office, stated:

> I am unable to find any evidence of any intent on the part of the locators at the time the location was made to use the claim for purposes other than mining, nor do I find any speculative intent has been proven. It is true the location was made in the immediate vicinity of a proposed dam site with the evident hope of benefiting from the construction of necessary works at and near the projected dam and the locators were opportunists of the most obvious sort. But the land was

> open to location upon a valid discovery of mineral by any qualified person or persons and in the absence of a clear intent to speculate in or otherwise use the land for purposes other than mining, it must be presumed that the locators' intent was to acquire the land for purposes consistent with the laws under which the claim was initiated. (R. 63)

In the final decision against petitioners, the same view as to any evidence to fraud was stated, thus:

> . . . there is no positive evidence . . . that the claimants knew or that it was a matter of general knowledge that the land would be appropriated by the Government . . . (R. 116)

BASIS OF JURISDICTION.

The statute under which jurisdiction of this Court is invoked is section 240 (a) of the Judicial Code (28 C. A., sec. 347 (a)).

The judgment sought to be reviewed was entered on March 20, 1944, and the date upon which this petition for certiorari is presented is June 2, 1944.

QUESTIONS PRESENTED.

1. Whether it was arbitrary, capricious and lawful for the Secretary to deny the claim to the public land solely on suspicion of a fraudulent purpose on the part of the claimants, which fraudulent purpose he found was actually disproved by evidence before him.

2. Whether it was arbitrary, capricious and lawful for the Secretary, because of such suspicion, to increase the burden of proof with regard to the subject of value, and to deny the claim because the claimants had not sustained the increased burden.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Court of Appeals has decided a Federal question in conflict with decisions of this Court, in that, in the light of the facts, the effect of its decision is that suspicion is a lawful basis of decision by the Secretary of the Interior, acting as a quasi-judicial officer in the administration of the public land laws; that suspicion of fraud may be acted upon by such an officer as sufficient proof of fraud; and that because of such suspicion the burden of proof imposed on claimants with regard to the value of a mineral deposit may be increased.

2. The opinion of the Court of Appeals states: "The Government may dispense its bounty on such terms as it sees fit; * * *." Such a statement, read in the light of the facts of this case, indicates the view that the Secretary of the Interior has authority to give or withhold the public lands according to his own will, and not merely to administer the will of Congress.

3. The effect of the decision, read in the light of the facts to which it is applied, will be to put much, if not all, of the action of the Secretary in the administration of the land laws (and of many other quasi-judicial agencies as well), beyond the corrective jurisdiction of the courts.

PRAYER.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued to the United States Court of Appeals for the District of Columbia, commanding the Court to certify and send to this Court a full and complete transcript of the record and all proceedings in the case in said Court numbered and entitled on its docket "No. 8378, *Harold L. Ickes, as Secretary of the Interior, appellant*, v. *Donald L. Underwood, Cora Underwood, Pauline Underwood, et al.*"; and that the judgment of the Court of Appeals may be reversed by this Honorable Court, and that

your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

DONALD L. UNDERWOOD, CORA UNDERWOOD, PAULINE UNDERWOOD, D. R. UNDERWOOD, ED. MICHALOWSKI,
Petitioners, by

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RUSSELL HARDY,
1625 K Street, N. W.,
Washington 6, D. C.

District of Columbia, ss:

Russell Hardy, being sworn, says he is the attorney for the petitioners named in the foregoing petition; that he has read the petition; that the facts stated therein are true so far as the same relate to his own acts and deeds, and so far as the same relate to the acts and deeds of any other person or persons, he believes them to be true; and that this petition is not filed for delay.

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Subscribed and sworn to before me June , 1944.

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Notary Public.